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RICHARD FRIEDMAN

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

14 RICHARD FRIEDMAN, an individual,  
15  
16 Plaintiff,

17 vs.

18 HANS ZIMMER, individually, and dba  
REMOTE CONTROL SONGS;  
19 TWENTIETH CENTURY FOX FILM  
CORPORATION; FOX SEARCHLIGHT  
20 PICTURES, INC.; FOX  
ENTERTAINMENT GROUP, INC.; NEW  
21 REGENCY PRODUCTIONS, INC.;  
MONARCHY ENTERPRISES, S.A.R.L.,  
22 individually, and doing business as  
REGENCY ENTERPRISES; RIVER  
23 ROAD ENTERTAINMENT, LLC; PLAN  
B ENTERTAINMENT, INC.; REMOTE  
24 CONTROL PRODUCTIONS, INC.; SONY  
MUSIC ENTERTAINMENT; IMAGEM  
25 PRODUCTION MUSIC LLC, individually,  
and dba 5 ALARM MUSIC and also doing  
26 business as CYPRESS CREEK MUSIC;  
DOES ONE through TEN, inclusive,

27 Defendants.  
28

Case No. 2:15-CV-00502 GHK (E)

**PLAINTIFF RICHARD  
FRIEDMAN'S MEMORANDUM  
OF POINTS AND  
AUTHORITIES IN OPPOSITION  
TO DEFENDANTS' MOTION  
TO DISMISS FIRST AMENDED  
COMPLAINT**

[FED. R. CIV. P. 12(b)(6)]

Honorable George H. King

Date: June 8, 2015

Time: 9:30 a.m.

Place: Courtroom 650

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Blecher Collins  
Pepperman & Joye



1 Plaintiff Richard Friedman (“plaintiff” or “Friedman”) respectfully submits  
 2 this memorandum of points and authorities in opposition to defendants’<sup>1</sup> Motion to  
 3 Dismiss First, Third, Fourth and Fifth Claims for Relief in the First Amended  
 4 Complaint (“FAC”).<sup>2</sup>

5 **I.**

6 **PRELIMINARY STATEMENT**

7 Lacking substantive merit, defendants’ motion to dismiss is nothing short of a  
 8 knee jerk respond and propitious attempt to eradicate this action in its early stages.  
 9 Defendants’ argument that the allegations fail to meet the notice pleading standard  
 10 set forth in Rule 8 of Federal Rules of Civil Procedure is meritless. Plaintiff  
 11 Friedman sufficiently and adequately alleges facts that satisfies each and every  
 12 essential element to support claims for copyright infringement (first claim)<sup>3</sup>,  
 13 violation of § 43(a)(1)(B) of the Lanham Act (15 U.S.C. § 1125(a)(1)(B)) (third  
 14 claim) and violation of moral rights under the copyright laws of Germany and  
 15 France (fourth and fifth claims). This is particularly true given that the factual  
 16

---

17 <sup>1</sup> The Motion at issue was brought by defendants Hans Zimmer, individually and  
 18 *dba* Remote Control Songs, Twentieth Century Fox Film Corporation, Fox  
 19 Searchlight Pictures, Inc., Fox Entertainment Group, Inc., New Regency  
 20 Productions, Inc., River Road Entertainment, LLC, Plan B Entertainment, Inc.,  
 21 Remote Control Productions, Inc., and Sony Music Entertainment (collectively  
 22 “defendants”). On April 24, 2015, Plaintiff filed a Notice of Dismissal pursuant to  
 23 Fed. R. Civ. P. 41(a)(1) without prejudice as to defendant Monarchy Enterprises,  
 24 S.A.R.L., individually and *dba* Regency Enterprises (ECF # 28).

25 <sup>2</sup> Pursuant to the Court’s May 5, 2015 Order, defendant Imagem Production Music,  
 26 LLC *dba* 5 Alarm Music and *dba* Cypress Creek Music (“Imagem”) has until June  
 27 1, 2015 to respond to the FAC (ECF # 30).

28 <sup>3</sup> The first claim for relief for copyright infringement is asserted against all  
 defendants except Sony Music Entertainment (“SME”) and Imagem Production  
 Music, LLC (“Imagem”). Because defendants’ motion does not dispute the  
 sufficiency of the second claim for copyright infringement alleged only against  
 defendant SME, plaintiff does not address this claim in this opposition.



1 allegations of the FAC must be liberally construed and all reasonable inferences  
2 drawn in favor of plaintiff Friedman.

3 Contrary to the well-established principles governing motions to dismiss,  
4 defendants, in seeking dismissal, ignore many of the express factual allegations in  
5 the FAC and instead draw every factual inference in their favor, not plaintiff's.  
6 Each of the three arguments advanced by defendants in support of their motion to  
7 dismiss the first, third, fourth and fifth claims fails. Defendants' first assert that  
8 plaintiff's claim for copyright infringement should be dismissed because it fails to  
9 satisfy Rule 8's pleading requirements in that it lumps all defendants together  
10 without alleging the specific infringing activity by each of them. Citing no authority  
11 whatsoever, defendants seek dismissal of this claim based on plaintiff's alleged  
12 failure to meet a heightened pleading standard that does not exist. All plaintiff  
13 Friedman is required to allege is a "short a short and plain statement of the claim"  
14 showing [he] is entitled to relief." Fed. R. Civ. P. 8(a). The authority makes clear  
15 that any increase in pleading standards for copyright infringement suits will have a  
16 chilling effect on the likelihood of rights-holders to file an action.

17 Second, defendants contention that plaintiff's third claim for relief, alleging a  
18 violation of section 43(a)(1)(B) of the Lanham Act, is foreclosed by the holding in  
19 *Dastar Corp v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S. Ct. 2041  
20 (2003) is similarly misplaced. The third claim alleges that defendants, in  
21 advertisements and promotional material, falsely credited Hans Zimmer  
22 ("Zimmer"), rather than plaintiff Friedman, as the composer of a musical score for  
23 the film 12 Years as a Slave ("*12YAS*"). (FAC ¶ 36.) The *Dastar* case, however,  
24 addresses a "reverse passing off" claim asserted under § 41(a)(1)(A) of the Lanham  
25 Act, whereas plaintiff's claim is based on the "misleading advertising" prong of  
26 § 43(a)(1)(B). Defendants' argument relies entirely on a narrow and selective  
27 reading of the *Dastar* opinion and simply ignores applicable case law addressing  
28 *Dastar's* application to § 41(a)(1)(B) claims. *See Clauson v. Eslinger*, 455 F. Supp.





2d 256, 261 (S.D.N.Y. 2006); 5 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 27.85 (4th ed. 2015) (hereinafter “MCCARTHY”).

Lastly, defendants assert that the Court should also dismiss the fourth and fifth claims, alleging violation of moral rights under German and French copyright laws, because plaintiff has failed to plead facts establishing a basis for litigating such claims in this Court. This argument is similarly flawed as it is predicated on the misleading premise that “[t]he law of the country of origin determines the nature of the rights held by the author of a copyrighted work.” (*See* Defendants’ Motion at 7.) While this is a technically correct statement of law, it is inapplicable in this context. Rather, the applicable legal issue here is that violations of foreign copyright laws **are**, indeed, cognizable in U.S. courts. *See Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491-492 (2d Cir. 1998); *Armstrong v. Virgin Records*, 91 F. Supp. 2d. 628 (S.D.N.Y. 2000).

For the reasons set forth below, plaintiff Friedman respectfully requests that the Court deny defendants’ motion to dismiss the first, third, fourth and fifth claims for relief in the FAC.

## II.

### **THE STANDARD GOVERNING DEFENDANTS’ MOTION TO DISMISS**

Motions to dismiss under Fed. R. Civ. P. 12(b)(6) are generally disfavored. They are to be rarely granted and then only in extreme circumstances. *See, e.g., Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746, 96 S. Ct. 1848, 1853 (1976); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1034 (C.D. Cal. 2007).

In ruling on a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept as true all factual allegations in the complaint, and must draw all reasonable inferences from those allegations, construing the complaint liberally in the light most favorable to the plaintiff. *Moss v. United States Secret Serv.*, 572 F.3d 962, 967-68 (9th Cir. 2009); *William O. Gilley Enters., Inc. v. Atlantic*

1 *Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009) (per curiam); *Boram v. Bogan*, 320  
2 F.3d 1023, 1028 (9th Cir. 2003).

3 Nothing more than notice pleading is required. *Erickson v. Pardus*, 551 U.S.  
4 89, 93, 127 S. Ct. 2197, 2200 (2007) (per curiam). Fed. R. Civ. P. 8 requires, not a  
5 specific quantity of facts, but simply “a short and plain statement of the claim  
6 showing that the pleader is entitled to relief.” *Bell Atlantic Corp. v. Twombly*, 550  
7 U.S. 544, 555, 127 S. Ct. 1955, 1964 (2007). “[A] well-pleaded complaint may  
8 proceed even if . . . actual proof of those facts is improbable, and a recovery is very  
9 remote and unlikely.” *Twombly*, 550 U.S. at 556 (quotations omitted). “Specific  
10 facts are not necessary,” and a complaint need only give the defendant fair notice of  
11 the claims and grounds upon which they rest. *Erickson*, 551 U.S. 89, 93, 127 S. Ct.  
12 2197, 2200 (2007) (per curiam); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506  
13 F.3d 832, 841 (9th Cir. 2007); *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965  
14 (detailed factual allegations are not required); *see also Ashcroft v. Iqbal*, 556 U.S.  
15 662, 677-78, 129 S. Ct. 1937, 1949 (2009).

16 The factual allegations of the FAC need only “be enough to raise a right to  
17 relief above the speculative level, . . . on the assumption that all the allegations in  
18 the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555, 127 S.  
19 Ct. at 1965; *Skaff*, 506 F.3d at 842 (*Twombly* did not impose heightened pleading  
20 standards.) Allegations are not to be discounted because they are “unrealistic or  
21 nonsensical,” but rather because they state a legal conclusion. *Moss*, 572 F.3d at  
22 969. There must simply be “enough facts to state a claim to relief that is plausible  
23 on its face.” *Twombly*, 127 S. Ct. at 1974. Facial plausibility exists “when the  
24 plaintiff pleads factual content that allows the court to draw the reasonable inference  
25 that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677-78,  
26 129 S. Ct. at 1949.

27 Fed. R. Civ. P. 8(a) definitely does not require a heightened standard of  
28 pleading in copyright infringement cases. *See CoStar Realty Info., Inc. v. Field*, 612



1 F. Supp. 2d 660, 674 (D. Md. 2009) (finding, after *Twombly*, that “[t]here is no  
2 heightened pleading standard for copyright infringement”). Rather, the “short and  
3 plain statement” and notice pleading standard under Rule 8 has been specifically  
4 applied to copyright actions. Plaintiff’s copyright claims are sufficient “[s]o long as  
5 the allegations of the complaint as a whole raise a reasonable expectation that  
6 discovery will reveal evidence of the necessary elements for copyright  
7 infringement[.]” 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT  
8 § 12.09[A][3] (2008) (hereinafter “NIMMER”). Defendants ask the Court to ignore  
9 this standard and instead impose a heightened pleading requirement, relying entirely  
10 on unpublished or wholly inapplicable decisions.

11 Plaintiff has pled the requisite elements of the claims alleged in the FAC with  
12 sufficient detail to apprise defendants of the challenged conduct and in full  
13 compliance with Fed. R. Civ. P. 8(a). Accordingly, plaintiff’s copyright  
14 infringement, Lanham Act and moral rights claims sufficiently meet this liberal  
15 pleading standard and should not be dismissed.

### 16 III.

#### 17 THE ALLEGATIONS IN THE FAC

18 Each of the claims at issue emanate from plaintiff’s copyright interest in a  
19 musical composition he wrote and composed in 2004 entitled *To Our Fallen*  
20 (hereinafter referred to as “the Composition”). (FAC ¶ 18.) The FAC first alleges  
21 that except for defendant Sony Music Entertainment (“SME”) and Imagem  
22 Production Music LLC (“Imagem”), all of the other above-referenced defendants  
23 directly infringed on plaintiff’s copyrights by reproducing and publishing his  
24 protected musical composition in the motion picture 12 Years as a Slave (“12YAS”) in the United States and throughout the world. (*Id.* ¶ 23.) The FAC alleges that in  
25 or around March 4, 2004, plaintiff and ABACO, a commercial music library,  
26 entered into a written agreement in which plaintiff assigned the legal ownership of  
27 the Composition to ABACO, but retained a beneficial interest in the copyright. (*Id.*  
28



1 ¶ 19.) In May 2004, ABACO recorded a derivative work of the Composition in a  
 2 music sampler entitled *American Heart*, which contained the Composition and  
 3 additional compositions by plaintiff and a second composer. (FAC ¶ 20.) The (i)  
 4 Composition and the (ii) sound recording of *To Our Fallen*, contained therein,  
 5 (hereinafter referred to as the “Sound Recording”) was widely distributed in 2004  
 6 and, thus, published at that time. (*Id.* ¶ 20.) In 2006, ABACO applied for and was  
 7 issued a Certificate of Registration of a Claim to Copyright in and to the  
 8 Composition and Sound Recording by the Register of Copyrights (No. SR 392-592).  
 9 (*Id.* ¶ 21.) Accordingly, plaintiff is the beneficial owner of the Composition and the  
 10 Sound Recording. (*Id.*)

11 The FAC further alleges that the Composition and Sound Recording were  
 12 embodied in an episode of the television show *Desperate Housewives* entitled “The  
 13 Juiciest Bites—In Memoriam.” (*Id.* ¶ 22.) The show aired on the ABC Television  
 14 Network in April 2008 and October 2009. (*Id.*) Plaintiff asserts that the string  
 15 overdub portions for the music for “The Juiciest Bites—In Memoriam” was  
 16 recorded at a facility owned in whole or in part by defendant Hans Zimmer  
 17 (“Zimmer”) called Remote Control Productions. (*Id.*)

18 In or around 2013, defendants produced and distributed the motion picture  
 19 *12YAS* in the United States and throughout the world. (*Id.* ¶ 23.) *12YAS* embodied  
 20 and reproduced musical compositions and cues, including, *inter alia*, the main  
 21 musical theme entitled *Solomon Northup*, ostensibly composed by defendant  
 22 Zimmer. (*Id.*) Notably, (a) the main theme for *12YAS*, *Solomon Northup*, (b) the  
 23 music for the closing credits, and (c) eleven (11) other musical cues embodied in  
 24 *12YAS* are based upon, and substantially similar to, the Composition that is the  
 25 subject of this dispute. (*Id.* ¶ 24.) All or most of the musical score for *12YAS* was  
 26 recorded at defendant Zimmer’s Remote Control Productions facility, the same  
 27 location where portions of the music “The Juiciest Bites—In Memoriam” (which  
 28 embodied plaintiff’s protected Composition and Sound Recording) was recorded in



1 or around 2008. (*Id.* ¶ 22.) Plaintiff alleges that this presents compelling evidence  
 2 that defendants had access to plaintiff’s copyrighted Composition and Sound  
 3 Recording. (FAC ¶ 22.) Although *12YAS* received widespread critical acclaim,  
 4 generated substantial worldwide profits, and resulted in defendant Zimmer receiving  
 5 a Golden Globe nomination for best musical score, none of the defendants ever  
 6 asked plaintiff, or any other person or entity in privity with plaintiff, to use or  
 7 license the protected Composition or Sound Recording in any capacity. (*Id.* ¶ 23-  
 8 24.)

9 The FAC alleges defendant “Zimmer claims that he owns and/or controls all  
 10 of the musical score and cues embodied in *12YAS*.” (*Id.* ¶ 25.) The FAC further  
 11 alleges that based on these false claims, defendants, in violation of plaintiff’s moral  
 12 rights under the copyright laws of numerous foreign nations where *12YAS* has been  
 13 distributed and exhibited, have improperly and incorrectly credited defendant  
 14 Zimmer, rather than plaintiff, as the composer of the Composition. (*Id.*)

#### 15 IV.

#### 16 **THE FAC ADEQUATELY AND SUFFICIENTLY ALLEGES A CLAIM FOR** 17 **COPYRIGHT INFRINGEMENT**

18 To establish a claim for direct copyright infringement, a plaintiff must  
 19 demonstrate (1) ownership of a valid copyright and (2) “copying” of protectable  
 20 expression by the defendant. *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir.),  
 21 *cert. denied*, 484 U.S. 954, 108 S. Ct. 346, (1987); *4 A & M Records v. Napster,*  
 22 *Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *Ellison v. Robertson*, 357 F.3d 1072,  
 23 1076 (9th Cir. 2004); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361,  
 24 111 S. Ct. 1282 (1991); *Ets–Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th  
 25 Cir. 2000); *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003). The  
 26 latter element may be established by showing that the works in question “are  
 27 substantially similar in their protected elements” and that the infringing party “had  
 28 access” to the copyrighted work. *Metcalf v. Bochco*, 294 F.3d 1069, 1072 (9th. Cir.



2002) (citation omitted). Infringement consists of the unauthorized exercise of one of the exclusive rights of the copyright holder delineated in section 106. 17 U.S.C. § 501(a). These rights include the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies to the public, and the right to publicly display the work. 17 U.S.C. §§ 106(1)-(3), (5). Direct infringement does not require intent or any particular state of mind, although willfulness is relevant to the award of statutory damages. 17 U.S.C. § 504(c).

**A. The Federal Rules Do Not Impose a Heightened Pleading Standard on Copyright Infringement Claims**

There is no universal standard of heightened fact pleading. A pleader is only required to amplify a claim with more specific factual allegations in contexts where such amplification is necessary to render the claim plausible. *See Iqbal*, 556 U.S. at 669, 129 S. Ct. at 1944. Copyright infringement claims typically exhibit characteristics that require only the most minimal factual specificity. Infringement liability only requires proof of two elements: ownership and copying.<sup>4</sup> *See* 4 NIMMER § 13.01 (explaining that copying is often established by indirect evidence).

Plaintiff does not dispute that under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” “[D]etailed factual allegations” are not required. *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1955. Here, the FAC sufficiently provides defendants with notice of the claims asserted against them. What plaintiff disputes is defendants’ unsupported argument a copyright action requires a plaintiff to identify the specific conduct by each defendant that constituted the alleged

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<sup>4</sup> As a matter of public policy, courts have refrained from increasing the pleading standards for copyright actions because this could create substantial roadblocks for plaintiffs wanting to protect their copyright interests. Any impediment to bringing an infringement suit erodes the protections copyright holders retain and could reduce the incentive for individuals to engage in the types of creative works protected under copyrights.





1 infringement. Failing to cite a single relevant case, defendants’ seek to impose a  
2 heightened pleading standard that is incompatible with Fed. R. Civ. 8.

3       There is no universal standard of heightened fact pleading. The determination  
4 of whether a claim requires amplification or is “plausible” is context-specific and  
5 requires the reviewing court to draw on its experience and common sense. *Iqbal*,  
6 556 U.S. at 663-64, 129 S. Ct. at 1940. Copyright infringement claims including the  
7 one at issue here, exhibit characteristics that require only the most minimal factual  
8 specificity, and must be evaluated in light of their unique substantive requirements.  
9 In particular, infringement liability only requires proof of two elements: **ownership**  
10 and **copying**. 4 NIMMER § 13.01 (explaining that copying is often established by  
11 indirect evidence which must show access and substantial similarity) (emphasis  
12 added). The standard Rule 8 announces does not require “detailed factual  
13 allegations,” but enough to show that the pleader is entitled to relief. *Iqbal*, 556  
14 U.S. at 678, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 544, 127 S. Ct. at  
15 1955); *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination*  
16 *Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 1163 (1993); *Swierkiewicz v. Sorema*,  
17 *N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 998-99 (2002). Indeed, the FAC alleges  
18 more than unadorned assertions that defendants unlawfully harmed the plaintiff.

19       Specifically, plaintiff alleges facts to satisfy both of these essential elements  
20 and support a claim for direct copyright infringement against defendants. The FAC  
21 alleges that plaintiff Friedman has a protected copyright interest in the musical  
22 composition and sound recording entitled *To Our Fallen*, thus satisfying the first  
23 essential element. (FAC ¶¶ 18, 20-21.) To satisfy the second element, the FAC  
24 alleges that defendants had access to plaintiff’s copyrighted work and “produced  
25 and distributed the film *12YAS* in the United States and throughout the world,”  
26 which “reproduced and embodied musical scores and cues ostensibly composed by  
27 defendant Zimmer” rather than plaintiff. (*Id.* ¶ 23.) “The main theme..., the music  
28 for the closing credits and eleven other musical cues embodied in *12YAS* are based





1 on and substantially similar to the Composition” in which plaintiff has a protected  
2 copyright interest. (FAC ¶ 24.) “Neither Plaintiff, nor any other person in privity  
3 with Plaintiff, has been asked by Defendants...for permission to use or license  
4 Plaintiff’s Composition in *12YAS*.” (*Id.*) These allegations adequately describe  
5 defendants’ infringing conduct and provide notice of the lawsuit and cause of action  
6 asserted against them. Accordingly, the FAC more than sufficiently satisfies Rule  
7 8’s notice pleading standard and requires that the Court accept the allegations as  
8 true.

9 Moreover, none of the cases relied on by defendants even remotely supports  
10 the notion that there is a heightened pleading requirement for copyright cases or that  
11 a plaintiff must identify the specific conduct by each defendant that constituted the  
12 alleged infringement. For example, defendants cite *Flores v. EMC Mortgage Co.*,  
13 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014) for the proposition that plaintiff is  
14 required to allege facts specifically identifying each infringing action undertaken by  
15 each defendant. Although *Flores* briefly discusses notice pleading generally, it does  
16 not involve **any** claim for copyright infringement. Rather, it concerns a complaint  
17 that lumps defendants together such that it failed to distinguish the claims and  
18 alleged wrongs among defendants. *Flores*, 997 F. Sup. 2d 1088. Here, the FAC  
19 makes clear which claim is asserted against each defendant.

20 Defendants also cite and rely on the wholly inapplicable case of *Eberhard*  
21 *Architects, LLC v. Bogart Architecture, Inc.*, 2014 WL 4354516, at \*3 (N.D. Ohio  
22 Aug. 29, 2014) in which the court concluded that plaintiff’s generic allegations that  
23 “all defendants engaged in copyright infringement” did not shed light on *how* the  
24 defendants engaged in copyright infringement. Unlike *Eberhard Architects, LLC*,  
25 plaintiff alleges substantially more facts than just stating that defendants engaged in  
26 copyright infringement. (FAC ¶¶ 22-27.) Indeed, the FAC specifically describes  
27 how and why defendants’ conduct constitutes infringement of plaintiff’s  
28 copyrighted compositions.



1 In further support of their argument that the first claim for copyright  
 2 infringement does not meet Rule 8's pleading standard, defendants also cite *In re*  
 3 *Providian Fin. Corp. ERISA Litig.*, 2002 WL 31785044, at \*4 (N.D. Cal. Nov. 14,  
 4 2002), which does not remotely concern any copyright claim. Indeed, this case  
 5 involved a class action complaint charging defendants with breach of fiduciary duty  
 6 requirements imposed by ERISA. *Id.* In the single paragraph decision, the court  
 7 held that the complaint was insufficient to put defendants on notice of the claims  
 8 against them because the plaintiffs lumped the various classes of defendants into  
 9 undifferentiated groups and alleged generally that they had all violated all of the  
 10 asserted fiduciary duties. *Id.* Acknowledging that Rule 8(a) requires only a "short  
 11 and plain statement of the claim," the court ordered plaintiffs to amend the  
 12 complaint so that each category of defendants had notice of their alleged duty and  
 13 breach. *Id.* Here, there is no claim for breach of fiduciary duty, which imposes a  
 14 different standard of care depending on the relationship of the parties. Despite the  
 15 fact that some of the defendants are distributors and some are producers, a copyright  
 16 infringement claim does not impose different standards of care on defendants  
 17 operating at various levels of the supply chain.

18 The contention that a defendant cannot be liable for copyright infringement  
 19 for its involvement in production of a motion picture is simply wrong. To the extent  
 20 a defendant possesses the "right and ability to supervise the infringing conduct" **and**  
 21 has "an obvious and direct financial interest in the exploitation of the copyrighted  
 22 materials," the defendant can be vicariously liable for the alleged copyright  
 23 infringement. NIMMER § 12.04[C][1]; *Fonovisa, Inc. v. Cherry Auctions, Inc.*, 76 F.  
 24 3d 259 (9th Cir. 1996) (a flea market owner could be held liable for contributory and  
 25 vicarious infringement). The Ninth Circuit has interpreted the knowledge  
 26 requirement for contributory copyright infringement to include "both those with  
 27 actual knowledge and those who have reason to know of direct infringement.  
 28 *Ellison v. Robertson*, 357 F. 3d 1072, 1076 (9th Cir. 2004) (emphasis in original).

1 The acts of related defendants, such as here, may be joined a single count. *See, e.g.*  
 2 3 NIMMER § 12.04[A] (discussing contributory infringement) and § 12.04[C][1]  
 3 (citing *Encore Music Productions, Inc. v. London Film Productions, Inc.*, 89  
 4 U.S.P.Q. 501 (SDNY 1951) “the producer would be responsible for its own acts of  
 5 infringement, and also might be liable for contributing to the alleged infringing acts  
 6 of five exhibitors in violation of plaintiff’s public performing rights”)).

7 V.

8 **PLAINTIFF’S LANHAM ACT CLAIM IS NOT PRECLUDED BY THE**  
 9 **DASTAR DECISION**

10 A. **The *Dastar* Decision Only Dealt with the “Reverse Passing Off Prong” of**  
 11 **the Lanham Act, i.e. Section 43(a)(1)(a), and Not the Prong that Forms**  
 12 **the Basis for Plaintiff’s Claim, Section 43(a)(1)(B)**

13 The FAC alleges that defendants violated section 43(a) of the Lanham Act  
 14 (15 U.S.C. § 1125(a)) for unfair competition and misrepresentation in connection  
 15 with plaintiff’s copyrighted Composition. Defendants assert that plaintiff’s third  
 16 claim for relief, for alleged violation of the Lanham Act, is precluded by Supreme  
 17 Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23  
 18 (2003) because it would conflict with the copyright laws, which protect the  
 19 author/owner of any idea, concept or communication. Defendants, however, rely on  
 20 a narrow and self-serving reading of *Dastar* and fail to address any of the later  
 21 authorities interpreting the opinion to the contrary.

22 Notably, the *Dastar* case dealt only with the “reverse passing off” prong of  
 23 § 43(a): § 43(a)(1)(A) of the Lanham Act (15 U.S.C. § 1125(a)(1)(A)) , whereas  
 24 plaintiff’s claim deals instead with § 43(a)(1)(B), the “misleading advertising”  
 25 prong of the Lanham Act (15 U.S.C. § 1125(a)(1)(B)). § 43(a)(1)(B) prohibits using  
 26 false descriptions and designations of origin when advertising or promoting goods  
 27 or services in commerce. (FAC ¶ 34.) The FAC alleges that, “[p]ursuant to  
 28 §43(a)(1)(B) of the Lanham Act, Defendants have misrepresented the nature,



1 characteristics and qualities of Defendant Zimmer’s services. The acts and activities  
 2 of Defendants and those acting in concert with them as set forth above, constitute  
 3 unfair competition with Plaintiff.” (FAC ¶ 35.) The *Dastar* decision only addresses  
 4 “reverse passing off” under § 43(a)(1)(A), but preserves an alternative basis for an  
 5 aggrieved author to assert a Lanham Act claim: the misrepresentation in advertising  
 6 prong of § 43(a)(1)(B). As Justice Scalia stated:<sup>5</sup>

7 [O]ne or more of the respondents might have a cause of  
 8 action -- not for reverse palming off under the  
 9 “confusion...as to the origin” provision of §43(a)(1)(A),  
 10 but for misrepresentation under the “misrepresents the  
 11 nature, characteristics [or] qualities” provision of  
 12 §43(a)(1)(B).

13 *Dastar Corp.*, 539 U.S. at 38, 123 S. Ct. at 2050.

14 In *Zyla v. Wadsworth, Div. of Thompson Corp.*, 360 F. 3d 243, 252 n. 8 (1st  
 15 Cir. 2004), the Court commented on the statement made by Justice Scalia in the  
 16 *Dastar* opinion, noting:

17 The Court in *Dastar* left open the possibility that some  
 18 false advertising claims could be vindicated under the  
 19 auspices of §43(a)(1)(B)’s prohibition on false advertising.

20 *See* 539 U.S. at 38, 123 S. Ct. at 2050.

21 Moreover, several prominent commentators have also indicated that the  
 22 Supreme Court has preserved authors’ claims under § 43(a)(1)(B): If the false  
 23 advertising or promotion of a book or a film misleads the public as to who wrote,  
 24 acted in or directed the work, the artists may find relief under the false advertising

25 \_\_\_\_\_  
 26 <sup>5</sup> *See* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and*  
 27 *Trademark Law*, 4 Houston L. Rev. 263, 272 (2004) (“It [the *Dastar* Court]  
 28 preserved claims under a related section of the trademark act [§ 43(a)(1)(B)].



provisions of the Lanham Act. 2 ANNE GILSON LALONDE & JEROME GILSON, GILSON  
ON TRADEMARKS § 7.07[6][d][ii][A] (2014) (hereinafter “GILSON”).

Similarly, another notable treatise opines:

Because the [*Dastar*] Court’s opinion addressed only  
section 43(a)(1)(A), it left open the possibility of relief  
under section 43(a)(1)(B)’s imposition of liability for  
misrepresenting “the nature, characteristics, qualities of  
defendant’s goods; unlike section 43(a)(1)(A), section  
43(a)(1)(B) requires that the offending use be in  
“commercial advertising or promotions.”

3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.14.3 (3d ed. Supp. 2012)  
(hereinafter “GOLDSTEIN”).

Consonant with the case law and treatises interpreting the *Dastar* opinion  
mentioned above, MCCARTHY also agrees that the Court left open the possibility for  
authors of artistic works under § 43(a)(1)(B) of the Lanham Act, stating:

Because the Court’s opinion addressed only section  
43(a)(1)(A), *it left open the possibility for relief...of*  
*literary and artistic works* under section 43(a)(1)(B),  
which bars misrepresentations of the “nature,”  
“characteristics” and “qualities” of a defendant’s goods.  
However...section 43(a)(1)(B) requires the offending use  
to be in “commercial advertising or promotion.”  
(emphasis added)

MCCARTHY, *supra*.

Plaintiff and defendant Zimmer are both music composers for film. Plaintiff,  
in the FAC, alleges that “[t]he applicable misrepresentation in Defendants’  
advertising and promotional materials reads: ‘MUSIC BY HANS ZIMMER’ rather  
than ‘MUSIC BY RICHARD FRIEDMAN.’” (FAC ¶ 36.)

1 The FAC further alleges that “Defendants knew, or had reason to believe, that  
2 these representations in commercial advertising and promotions throughout the  
3 United States and numerous foreign nations crediting Defendant Zimmer with  
4 ownership of the works in *12YAS* were false and misleading, and were likely to, and  
5 did cause a substantial segment of viewers of the film to be deceived, confused,  
6 and/or mistaken about the nature, source, characteristics, qualities, and/or the origin  
7 of the music embodied in *12YAS*.” (FAC ¶ 38.)

8 **B. The Cases Relied on by Defendants Are Not Binding on this Court and**  
9 **Conflict with Other Authority Addressing the *Dastar* Decision**

10 In support of their argument that decision of *Dastar Corp. v. Twentieth*  
11 *Century Fox Film Corp.*, precludes plaintiff from bringing its Lanham Act claim,  
12 defendants rely only on cases that provide a limited and incomplete view of the  
13 applicable law. Defendants fail to discuss, distinguish or even address any of the  
14 case authority or treatises, some of which are mentioned above, that take a position  
15 contrary to the one expressed in their Motion.

16 For example, defendants cite *Antidote Int’l Films, Inc. v. Bloomsbury Publ’g*  
17 *PLC*, 467 F. Supp. 2d 394, 400 (S.D.N.Y. 2006) for the proposition that  
18 § 43(a)(1)(B) cannot be read to refer to authorship. However, *the same court* in the  
19 same year, in *Clausen v. Eslinger*, 455 F.Supp. 2d 256 (S.D.N.Y. 2006), held that  
20 § 43(a)(1)(B) could provide relief *for literary or artistic works* that were  
21 misrepresented in advertising or promotional materials. The *Clausen* court, cited to  
22 Justice Scalia’s statement in *Dastar* cited by plaintiff (539 U.S. at 38, *supra*), in  
23 holding:

24 The *Dastar* Court explicitly left open the possibility that  
25 some false authorship claims could be vindicated under  
26 the auspices of this section’s [§ 43(a)(1)(B)’s] prohibition  
27 on false advertising.”

28 *Clausen*, 455 F.2d at 261-62.





1 The *Clausen* court also held that:

2 The [Dastar] Court grounded its holding in what it ruled  
3 was the “natural understanding” of section 43(a)(1)(A)’s  
4 phrase “origin of goods” [citation]. It concluded, in short,  
5 that although this phrase does not extend to the originator  
6 of the idea that the goods embody, it does reach beyond  
7 geographic origin to origin of production of physical  
8 goods at issue. [Citation.] *In contrast, Congress did not*  
9 *incorporate any such reference into §43 (a)(1)(B), the*  
10 *false advertising prong of the Lanham Act. 15 U.S.C.*  
11 *§1125(a)(1)(B).* [Emphasis added.] Instead, in section  
12 43(a)(1)(B), it mandated liability for misrepresentation of  
13 “the nature, characteristics, [or] qualities” of goods in  
14 commercial advertising or promotion. 15 U.S.C.  
15 §1125(A)(1)(B).

16 *Id.*

17 Furthermore, defendants’ reliance on *Baden Sports, Inc. v. Molten USA, Inc.*,  
18 556 F. 3d 1300, 1307 (Fed. Cir. 2009) is also misplaced. In *Baden*, a case that deals  
19 with the quality of basketballs and not mis-attribution of authorship, the court,  
20 erroneously relied on what it understood to be applicable Ninth Circuit case law  
21 finding that “authorship...is not a nature, characteristic, or quality, as these terms  
22 are used in Section 43(a)(1)(B) of the Lanham Act.”<sup>6</sup> *Baden Sports, Inc.*, 556 F. 3d  
23

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24 <sup>6</sup> Jane C. Ginsburg, *supra*, (“Arguably, removing my or the actor’s name and  
25 replacing it with another’s constitutes a false or misleading representation of fact  
26 (who is the author of this book; who performed in this film) that misrepresents the  
27 nature, characteristics, or qualities (authorship, performance) of the goods (the  
28 work). Note that, for purposes of section 43(a)(1)(A), ‘goods’ would mean only the  
physical copies....In any event, the potential availability of a section 43(A)(1)(B)





at 1307. Although the *Baden Sports, Inc.* case was before the Federal Circuit to address patent claims relating to the basketballs, the court pointed out that it applies the law of the regional circuit on non-patent issues. *Id.* at 1304. Thus, the court relied on *Sybersound Records, Inc. v. UAV Corp.*, 517 F. 3d 1137 (9th Cir. 2008), a Ninth Circuit case, in deciding the Lanham Act issue. Like *Baden Sports, Inc.*, *Sybersound* was not a case dealing with attribution or misattribution of authorship, but rather the licensing status of karaoke records. In articulating that point, *Sybersound*, with *Baden Sports, Inc.* following its lead, actually held that the underlying communicative work is protectable under the advertising prong of § 43(a)(1)(B) of the Lanham Act: “[T]he nature, characteristics, and qualities of karaoke recordings under the Lanham Act are more properly construed to mean characteristics of the good itself, such as *the original song and artist* of the karaoke recording, and the quality of its audio and visual effects.” 517 F. 3d at 1144.<sup>7</sup>

Defendants also rely on *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 307-08 (S.D.N.Y. 2011) and in so doing, conflates the § 43(a)(1)(A) and § 43(a)(1)(B) claims raised in that case to assert--without specific citation to any part of the decision--that the “*Dastar* forecloses plaintiff’s § 43(a)(1)(B) false advertising claim based on alleged misrepresentation of authorship.” (Motion at 6.) A close reading of the *Morel*, however, shows that the court was not discussing “authorship” regarding plaintiff’s § 43(a)(1)(B) claim, but rather defendants’ false statements that they were authorized to distribute the images of photographs, and claim becomes particularly significant if, after *Dastar*, the origin of copyrighted works is falsely designated only where the entire work is misattributed.”

<sup>7</sup> See GILSON § 7.02[6][d] (2014) (commenting on the *Sybersound* decision: “The Ninth Circuit was more ambiguous in holding that false statements about the licensing status of karaoke songs are not covered, but that statements about the original songs or artists may be”); GOLDSTEIN § 17.14.3 n. 180.1 (calling *Sybersound* “a more questionable decision”); *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 997 (E.D. Wis. 2011) (“the *Sybersound Records* court’s holding has been widely lampooned in several respected treatises).



1 plaintiff's claim that a unrelated third party was the author. *Morel*, 769 F. Supp. 2d  
2 at 308. The *Morel* court notes that "[y]et neither of these misrepresentations  
3 concern the nature, characteristics, qualities, or geographic origin of the  
4 photographs." *Id.*

5 To the contrary, in Jane C. Ginsburg's seminal law review article about the  
6 unintended effects of *Dastar*, she argues that "authorship and performance are the  
7 nature, characteristics, or qualities...of the goods (the work)."<sup>8</sup> Jane C. Ginsburg,  
8 *supra* at 275. She asserts "removing my or the actor's name and replacing it with  
9 another's constitutes a false or misleading representation of fact (who is the author  
10 of this book; who performed in this film) that misrepresents the nature,  
11 characteristics, or qualities (authorship; performance) of the goods (the work). Note  
12 that, for purposes of section 43(a)(1)(B), the [*Dastar*] Court appears to have  
13 acknowledged that "goods" can mean a "communicative work," while, for purposes  
14 of section 43(a)(1)(A), "goods" would mean only the physical copies. *Id.*

15 Other notable treatises take a similar position:

16 "Although *Dastar* significantly undermined section  
17 43(a)(1)(A)'s efficacy for requiring attribution of  
18 authorship, it did leave open the possibility of relief under  
19 section 43(a)(1)(B), dealing with misrepresentation of the  
20 quality or characteristics of goods and services, so long as  
21 the plaintiff can meet the provisions' threshold  
22 requirement of commercial advertising or promotion."  
23 (emphasis added)

24 3 GOLDSTEIN, *supra*, § 17.24.2.1

25 Plaintiff is not making a § 43(a)(1)(A) Lanham Act claim for reverse passing  
26 off like in *Dastar*. Rather, plaintiff's claim implicates the false advertising prong of

27 \_\_\_\_\_  
28 <sup>8</sup> See also Jane Ginsburg, *supra*, n.6.



§ 43(a)(1)(B) arising from consumer confusion between plaintiff’s musical composition and that of defendant Zimmer’s as a result of false advertising and promotion of allegedly infringing musical work. (FAC ¶¶ 26-28). Unlike plaintiff Friedman and defendant Zimmer who are both musical composers in direct competition with each other, the parties in the *Antidote* and *Morel* cases relied on by defendants, were creators on one hand and distributors of communicative products on the other. The claims in those cases both concerned “false representation of ‘affiliation’ between the author and a distributor of communicative products.” *Morel*, 769 F. Supp. 2d at 307. Moreover, even in *Sybersound*, the sole basis for the court’s decision, the Ninth Circuit acknowledged the nature, characteristics, and qualities of karaoke recordings under the Lanham Act are more properly construed to mean “characteristics of the good itself, *such as the original song and artist* of the karaoke recording....” (emphasis added) 556 F.3d at 1305-07.

Except for *Sybersound* as discussed by the *Baden Sports, Inc.* case, defendants fail to cite a single Ninth Circuit case supporting their argument. In fact, defendants neglect to cite the pertinent Ninth Circuit case *Photomedex, Inc. v. Irwin*, 601 F.3d 919, 932 -933 (9th Cir. 2010). In *Photomedex*, the Ninth Circuit, vacated a ruling granting summary judgment based on claims relating to defendant Irwin’s status as inventor of a particular device, and without any discussion of *Dastar*, held;

Photomedex asserts the defendants deceptively proclaimed Irwin was “inventor” of the XTRAC, *i.e.*, that Irwin was the only, or at least the primary, inventor of the entire XTRAC laser system. *Id.* The court found that calling Irwin the “inventor of the XTRAC” might have been misleading and vacated the summary judgment ruling and remanded to the lower court for further proceedings on the claims relating to defendants’ representations that Irwin was the inventor of the XTRAC.

1 *Id.*

2 Thus, the two Ninth Circuit decisions, *Sybersound* and *Photomadex*, as well  
3 as the other authorities discussed herein, require that defendants' motion be denied  
4 with respect to plaintiff's third claim for relief alleging a violation of § 43(a)(1)(B)  
5 for false advertising under the Lanham Act.

6 VI.

7 **PLAINTIFF ADEQUATELY STATES CLAIMS FOR VIOLATIONS OF**  
8 **MORAL RIGHTS UNDER THE COPYRIGHT LAWS OF GERMANY AND**  
9 **FRANCE**

10 Defendants argue that the fourth and fifth claims for violation of moral rights  
11 under the copyright laws of Germany and France should be dismissed on the  
12 grounds plaintiff fails to allege facts sufficient to show a basis for litigating such  
13 claims in this Court. Defendants' assertion, however, is predicated on the accurate,  
14 but misleading assertion that it is "the law of the country of origin determines the  
15 nature of the rights held by the author of a copyrighted work." (Motion at 7.)  
16 Plaintiff does not dispute that this an accurate expression of the law in light of the  
17 circumstances presented in the two cases relied on by defendants in making this  
18 point: *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F. 3d 82, 90-92  
19 (2d Cir. 1998) and *Fahmy v. Jay-Z*, 788 F. Supp. 2d 10772, 1977-1083 (C.D. Cal.  
20 2011).

21 In those cases, the respective courts properly applied foreign law in order to  
22 determine the rights held by the author, but neither court held that violations of  
23 foreign copyright laws are not cognizable by U.S. District Courts.<sup>9</sup> Additionally,  
24

25 \_\_\_\_\_  
26 <sup>9</sup> See *Boosey & Hawkes Music Publishing LLC v. Walt Disney Co.*, 145 F.3d 481,  
27 491-92 (2d Cir, 1998)(copyright laws of 18 nations implicated and claims  
28 thereunder were permitted to proceed), *Frink America, Inc. v. Champion Mach., Ltd*,  
961 F. Supp. 398, 404-05 (N.D.N.Y. 1997) (affirming that violations of foreign



defendants also cite *Kelly v. Chicago Park District*, 635 F. 3d 290, 298 (7th Cir. 2011) for the false proposition that because the U.S. Copyright Act does not recognize any moral rights in connection with musical compositions, that plaintiff, thus, has no moral rights to enforce. (Motion at 7.)

Case law starkly rejects defendants empty assertion that plaintiff is precluded from bringing claims for violation of moral rights in musical compositions under the laws of foreign nations. For example, in one such case, *Boosey & Hawkes Music Publishing LLC v. Walt Disney Co.*, 145 F.3d 481, 491-492 (2d Cir, 1998), the court found that the copyright laws of more than 18 nations were implicated and that claims under the laws of those countries were permitted to proceed in U.S. courts. Accordingly, plaintiff has properly pled the fourth and fifth claims, which can and should proceed in this Court.

**A. Plaintiff Is Not Required to Identify Any Further Activities Occurring within Germany or France**

Defendants also argue, albeit incorrectly, that the fourth and fifth claims should be dismissed because the FAC has not identified any activities capable of infringing on plaintiff's rights that occurred in either Germany or France. Defendants argue that because the FAC alleges generally that *12YAS* and its soundtrack were distributed "numerous foreign nations" and "many countries of the world" rather than identifying Germany and France specifically, plaintiff fails to properly state claims for violation of moral rights. (FAC ¶ 25, 29.) Despite defendants protestations, there is not requirement that plaintiff identify that the infringing activities took place specifically within Germany or France in order to properly state a claim for violation of moral rights or to satisfy Rule 8's liberal notice pleading standard.

copyright laws are cognizable in U.S. courts); *Armstrong v. Virgin Records*, 91 F. Supp. 2d 628 (S.D.N.Y. 2000) (same).

Indeed, the plaintiff incorporates by reference all previous paragraphs of the FAC including ¶¶ 25 and 29, which states that plaintiff's moral rights have been violated under the copyright laws of the numerous foreign nations where *I2YAS* was distributed and exhibited. The FAC then sets forth, in the fourth and fifth claims for relief, the applicable provisions of the German and French copyright laws, which, *inter alia*, embody the moral rights allegedly infringed by defendants. Moreover, the argument advanced by defendants for dismissing these claims flies in the face of the underlying policy concerning notice pleading under Rule 8. "The interest and effect of the rules is to permit the claim to be stated in general terms." *Nagler v. Admiral Corp.*, 248 F.2d 319, 324 (2d Cir. 1957). Moreover, the rules are designed to "discourage battles over mere form of statement." *Id.*

Defendants' form over substance argument exemplifies precisely what Rule 8 is intended to discourage. Accordingly, this Court should deny defendants' motion to dismiss the fourth and fifth claims for relief.

## VII.

### **IF ANY PORTION OF THE FIRST AMENDED COMPLAINT IS DEEMED DEFICIENT, LEAVE TO AMEND THE PLEADING SHOULD BE FREELY GRANTED**

As shown above, plaintiff's FAC should not be dismissed. If the Court finds otherwise, however, plaintiff requests leave to amend its pleading. Fed. R. Civ. P. 15(a) provides that "leave shall be freely given when justice so requires." If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless no possible amendment would cure the complaint's deficiencies. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). A denial of leave to amend is reviewed for abuse of discretion, "but such denial is "strictly" reviewed in light of the strong policy permitting amendment." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 537 (9th Cir. 1989) (citation omitted); *DCD Programs, Ltd. v.*



1 *Leighton*, 833 F.2d 183, 190 (9th Cir. 1987) (reversing district court’s denial of  
2 plaintiff’s motion for leave to file a fourth amended complaint).

3 In exercising that discretion, a district court must be guided by the underlying  
4 purpose of Fed. R. Civ. P. 15, which is “to facilitate decision on the merits, rather  
5 than on the pleadings or technicalities.” *United States v. Webb*, 655 F.2d 977, 979  
6 (9th Cir. 1981). Indeed, “Rule 15’s policy of favoring amendments to pleadings  
7 should be applied with ‘extreme liberality.’” *Id.*; *see also DCD*, 833 F.2d at 186;  
8 *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam).  
9 Consequently, should the Court find any legal infirmity in the present FAC, plaintiff  
10 should be given leave to cure it.

### 11 **VIII.**

### 12 **CONCLUSION**

13 For the reasons set forth above, plaintiff Friedman respectfully submits that  
14 defendants’ motion to dismiss the first, third, fourth and fifth claims for relief in the  
15 First Amended Complaint should be denied in its entirety. In the alternative, if the  
16 Court is inclined to grant the motion, plaintiff Friedman respectfully requests leave  
17 to amend.

18 Dated: May 18, 2015

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